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Supreme Court, U.S.
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No. 99-

In The

Supreme Court of the United States

October Term, 1999

BRUCE LEON ROBINSON,

Petitioner,

versus

JAMES R. METTS, SHERIFF OF LEXINTON COUNTY, *et al*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a Fourth Amendment civil rights claim brought pursuant to 42 U.S.C. §1983 precluded under the doctrine of collateral estoppel, when the state court finding of the existence of probable cause to arrest is not conclusive nor final, such that full and fair opportunity to litigate the constitutional issue was never afforded by any court?

PARTIES TO THE PROCEEDING

The parties before the court of appeals were Appellant Bruce Leon Robinson and Appellees James R. Metts, as Sheriff of Lexington County; and Detective Glenn Oxendine, Caption Adrian Bost, Sergeant Duane R. Peake, Detective Anthony Plante, Detective Jimmy Smith, Detective Larry Harrison, Detective Jim Graham, and Detective Ken Correll, in their individual capacities.

Additional parties to the proceeding in the district court were Lexington County, a political subdivision; Lexington County Sheriff's Department; Kim D. Feaster; James E. Harris; Sergeant John Doe; Richard Roe; and the State of South Carolina; as defendants.

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Petitioner, Bruce Leon Robinson, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Robinson v. Metts*, No. 97-1527 (4th Cir., Aug. 17, 1999), is not published but can be found at 1999 WL _____(App. A). The opinion of the district court in *Robinson v. Metts*, No. 3:95-1866-23 (D.S.C. Mar. 17, 1997) is not published, but can be found at 1997 WL _____ (App. C.).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on August 17, 1999, per curium, by quorum panel. The Court of Appeals denied a timely petition for rehearing on September 13, 1999 (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable

> searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges and immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The fundamental question in this case is whether a state court pre-trial finding of probable cause to arrest is sufficient in finality and conclusiveness to bar a subsequent federal civil rights action against police officers for improper arrest, under the doctrine of collateral estoppel.

On two occasions, this Court has expressly left this question "to another day" when pre-trial motions on Fourth Amendment grounds were actually raised in state-court criminal proceedings. This case presents these exact circumstances.

1. The State Court Criminal Case

The State Court criminal case was dismissed by the Solicitor. Petitioner Robinson was employed by the Lexington County Detention Center as a corrections officer. In June, 1992, the Lexington County Sheriff's Office began an investigation of suspected smuggling of contraband (cigarettes and marijuana) into its jail facility.

Inmate Gary Martin was questioned by sheriff's deputies after his mother was caught smuggling cash into the jail. Martin implicated Petitioner Robinson and fellow correctional officer Harry Perry as persons smuggling contraband into the jail. The inmate advised that this wife would place the contraband on a motor vehicle used by petitioner and located in the jail parking lot. He stated that petitioner would then retrieve the package and bring it into the jail during his shift. Inmate Martin was a first-time informant with no history of reliability.

A deal was set up for June 18, 1992. Sheriff's deputies Oxendine and Peake prepared a package of contraband (cigarettes, marijuana, lighters, cigarette rolling papers and three $20.00 bills), and placed the contraband on the left rear tire of petitioner's vehicle. Videotape surveillance was set up on petitioner's vehicle in the jail parking lot.

When petitioner left the jail on the morning of June 19, 1992, he did not approach the left rear wheel where the package had been placed. He went to the car, put some items in, and headed to the jail cafeteria for breakfast with fellow officer Perry. Upon returning from the cafeteria, the petitioner and Perry simply got in his vehicle and drove off.

After petitioner drove away, the sheriff's deputies could not find the package in the parking lot. A decision was made to arrest these correctional officers and a number of deputies in several vehicles followed petitioner through the town of Lexington, down a U. S. Highway, and onto an interstate entrance ramp. At a point past the interstate entrance ramp, petitioner stopped his vehicle to investigate a noise coming from the left rear wheel well. Upon exiting the vehicle and finding the package of contraband wedged in the wheel well, petitioner drove down the interstate to the next available exit ramp, exited the highway and turned his vehicle back toward Lexington where the sheriff's department was located.

The many sheriff's deputies then stopped the vehicle,

arrested petitioner and his fellow correctional officer. Upon incidental search, the deputies found the contraband that they themselves had placed on the vehicle.

Petitioner was charged with "conspiracy to possess with intent to distribute marijuana" and 'possession with intent to distribute marijuana." Following the arrest, sheriff's deputy Oxendine sought a post-seizure warrant for arrest of petitioner from South Carolina State Court Magistrate Shirley Sons. Oxendine advised this state court judge of the facts noted above but omitted the salient fact that the sheriff's deputies had actually planted the marijuana and other items on petitioner's vehicle. Judge ons issued the post-seizure arrest warrants. She later stated that had she known of the exculpatory evidence that the evidence was "planted", she would not have issued the warrant because probable cause to arrest did not exist.

Petitioner was indicted by a Lexington County Grand Jury on October 22, 1992. On November 22, 1994, the Grand Jury returned additional indictments against him arising out of the same incident, including two counts of "misconduct in office" and two counts of "contraband-county or municipal prisoner".

Following a hearing on petitioner's motion to dismiss the indictments, another state judge, Marc H. Westbrook, determined that probable cause to arrest did exist. Petitioner thereafter accepted an offer from the prosecutor and entered into an agreement, whereby the state prosecutor dropped the drug charges and allowed petitioner to attend pre-trial intervention as to the charges of "misconduct in office" and "contraband - county or municipal prisoner". Petitioner successfully completed that program and those charges were dismissed as well.

2. The Federal Court Civil Rights Case

Petitioner filed his original complaint in the United

States District Court for South Carolina on June 19, 1995. In his amended complaint filed on June 27, 1996, he alleged illegal search and seizure pursuant to the Fourth Amendment, and civil conspiracy and malicious prosecution , all pursuant to 42 U.S.C. §1983.

The United States District Court for South Carolina, granted summary judgment against petitioner, finding that the pre-trial ruling of the state judge was sufficiently conclusive and final such that collateral estoppel barred relitigation of the probable cause issue. The claims for illegal search and seizure, malicious prosecution, and municipal liability for such constitutional torts were therefore dismissed. The District Court determined further that qualified immunity existed as a result of the state court determination and application of collateral estoppel. (App. C)

The Court of Appeals for the Fourth Circuit, per curium, quorum of two judges, affirmed the decision of the district court, by express adoption of the lower court's rationale for decision. (App. A).

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS THAT COLLATERAL ESTOPPEL BARS RELITIGATION OF ONLY THOSE ISSUES DECIDED CONCLUSIVELY AND WITH FINALITY.

Bruce Leon Robinson's petition for writ of certiorari should be granted because the opinion below conflicts with this Court's important prior rulings on the doctrine of collateral estoppel. In *Allen v. McCurry*, 449 U.S. 90, 101 (1980) the Court determined that the doctrine of collateral estoppel

applies to 1983 suits against police officers to recover for Fourth Amendment violations, but only where the plaintiff had a "full and fair opportunity" to litigate his federal claim in the state court criminal case. Three years later in *Haring v. Prosise*, 462 U.S. 306 (1983), the Court held that a 1983 action is not barred by a guilty plea in the state court criminal case. The court stated as follows:

> "Since no motion to suppress evidence on Fourth Amendment grounds was ever raised at the state-court proceedings, this case does not present questions as to the scope of collateral estoppel with respect to particular issues that were litigated and decided at the criminal trial in state court. As we did in *Allen v. McCurry*, 449 U.S. 90, 93, n.2 (1980), we now leave those questions to another day. (462 U.S. at 323, n.2)

This case presents the questions left unanswered in 1980 and 1983.

The facts presented by petitioner establish that he was afforded a "partial opportunity to litigate the arrest, search and seizure issues in the state court criminal proceeding. In a pre-trial hearing, he raised a motion to dismiss the indictments based upon Fourth Amendment grounds. After consideration of some evidence (the sworn affidavit of state judge Sons finding no probable cause was excluded from consideration), state Judge Westbrook found that probable cause did exist for the arrest and search incident thereto. The following day, after a jury was empaneled, the state prosecutor unilaterally decided to dismiss the criminal charges at issue in this case coupled with an agreement under which the prosecutor allowed him to attend pre-trial intervention on other charges which were also dismissed pursuant to South Carolina statute.

This was an offer Petitioner could not refuse. The drug charges were dropped and following successful completion of the pre-trial intervention program the misconduct

in office and contraband charges were dismissed as well. There was no trial, during which the state Judge could have reversed his pre-trial probable cause determination. There was no jury verdict or judgment entered thereon. There were no appellate proceedings, nor habeas corpus proceedings. In reality, the unilateral decision of the prosecutor took away any avenue to review the state Judge's ruling.

Application of principles of collateral estoppel to bar petitioner's 1983 action necessarily requires a full rather than partial opportunity to litigate the probable cause issue. The issue upon which the state Court covened, that being the guilt or innocense of the criminal charges, in no way included the issue of legality of arrest, search or seizure.

In *Allen, supra,* the Court determined that in 1983 actions, a state-court *judgment* will not be given collateral-estoppel effect where "the party against whom an earlier court decision is asserted did not have a *full* and fair opportunity to litigate the claim or issue decided by the first court" Id., at 101 (*emphasis supplied).* The word "judgment" necessarily implies a valid "final" judgment. The word "full" opportunity necessarily implies something more than a "partial" opportunity to litigate.

In *Haring, supra,* the Court impliedly accepted the notion that the underlying state court judgment alleged to have preclusive effect is necessarily a "final" judgment. In confirming that the preclusive effect in federal court is no greater than that provided by the state issuing the judgment, the court went on to analyze the way the courts of the state of Virginia utilized principles of estoppel and res judicata to bar claims and issues raised subsequent to the first action. The Court used the words, "valid (final) judgment" when looking to Virginia law. Id.,at 314. In *Migra v. Warren City School District Board of Education,* 465 U.S. 75, 83-84 (1984), the Court rejected the notion that a distinction should exist between the issue preclusive and claim preclusive effects of

state-court judgments. Thus, it appears clear that a state court judgment, to be given preclusive effect on a particular issue, must necessarily be a "final" judgment on the issue itself.Moreover, a "full" opportunity to litigate is often rendered meaningless in the context of a criminal case. As noted by the Court in *Haring, supra*, 462 U.S. at 322-323, "The rule would require 'an otherwise unwilling party to try [Fourth Amendment] questions to the hilt' and prevail in state court 'in order to [preserve] the mere possibility' of later bringing a 1983 claim in federal court." Thus, finding such a rule repugnant to the need to protect federal rights which motivated enactment of 1983, the Court refused to accept such a rule in the context of a guilty plea in state court criminal proceedings. Id., at 323. Here, petitioner entered no plea other than "not guilty" and a non-final, pre-trial ruling makes absolutely no difference to this proper analysis. Above all, no absolute federal rule of preclusion exists, and to the extent issue preclusion will occur, it must be determined by state law.

The courts of South Carolina have never recognized that a pre-trial ruling in a criminal case later dismissed has any preclusive effect at all. For instance, *State v. McMillan,* 189 SC 444, 1 SE2d 626, (1939), wherein the South Carolina Supreme Court held:

> "where there has not been a trial, ruling on pre-trial motions...are interlocutory and not final for purposes of appeal."

See also, *Shelton v. Oscar Mayer Food, Inc., et al,* 325 SC 248, 481 SE2d 706, (1997), holding prior ruling of employment security commission was not preclusive of later litigation between the parties; *Pye v. Aycock,* 325 SC 426, 480 SE2d 455, (Ct. App. 1997), wherein South Carolina adopted the *Restatement (Second) of Judgments, (1982) Section 28* which specifically provides elements for determination of the

application of collateral estoppel and/or *res judicata*. Of that Section, several apply here and lead to the conclusion that neither colalteral estoppel or *res judicata* bar Petitioner's 1983 action, for example: subsection (1), [petitioner could not, as a matter of law, obtain review of the pre-trial ruling] (2)[to hold otherwise would be an "inequitable administration of the laws"] and (5)[potential impact upon public interest in protecting Constitutional guarantees]. These clearly support Petitioner's position herein. Specifically, subsection 5(c)states that to do so would be error "because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a ***full and fair*** adjudication in the initial action", [emphasis added].

Further, the issue in the criminal case was whether or not Petitioner had possessed controlled substances with intent to distribute and whether he possessed them at all. These issues are irrelevant to the case at hand as Justice Marshall wrote in *Haring, supra, at page 315-316:*

> "Futhermore, collateral estoppel precludes the litigation of only those issues necessary to support the judgment entered in the first action...The only issue raised by the criminal indictment and determined by Prosise's guilty plea.....was whether Prosise unlawfully en gaged in the manufacture of a controlled substance. This questions is simply irrelevant to the legality of the search under the Fourth Amendment or to Prosise's right to compensation from state officials under Section 1983".

Here, there was no guilty plea, the charges were dismissed and the issues rasied by the criminal indictment against Petitioner were irrelevant to the detemination of the legality of his arrest, search and seizure or his right to compensation under Section 1983. Thus, collateral estoppel does not preclude

re-litigation of the constitutional issue even if the pre-trial ruling were to be considered as a full and fair opportunity to litigate the civil rights issue.

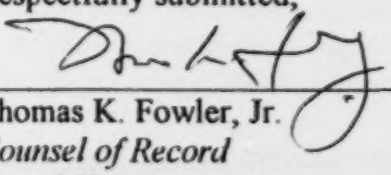
CONCLUSION

This case presents a question of exceptional importance-whether a litigant is prohibited upon the basis of collateral estoppel or *res judicata* from pursuing his Section 1983, claim due to pre-trial rulings in the underlying criminal proceedings which were dismissed by the prosecutor before trial. If the ruling below is allowed to stand, no person will be able to proceed pursuant to the provisions of section 1983, even when the underlying criminal case has been dismissed against them. All such cases will then be determined, once and for all, upon the rulings of a state Court ruling upon pre-trial matters from which no appeal can be taken and which are explicitly *interlocutory*.

By granting this petition for certiorari, however, this Court can finally address the issue as preserved for the last nineteen (19) years and can correct the ruling of the Fourth Circuit which, in effect, denies citizens the rights afforded pursuant to the United States Constitution's Fourth Amendment and 42 USC 1983, *in toto*.

Accordingly, the Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,



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APPENDIX A – OPNION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED AUGUST 17, 1999

PER CURIAM:

Bruce Leon Robinson brought this action against various South Carolina law enforcement officers[2] alleging that they were guilty of, *inter alia*, illegally searching and seizing him, engaging in a civil conspiracy, and maliciously prosecuting him. Robinson now appeals the decision of the district court granting Appellees' motion for summary judgment. We affirm.

I.

In 1992, when the events underlying this action occurred, Robinson was employed by the Lexington County Detention Center (LCDC) as a corrections officer. An investigation of marijuana being smuggled into the LCDC led to the questioning of inmate Gary Martin. Martin informed LCDC officials that two LCDC correctional officers, Robinson and Harry Perry, were bringing contraband—in the form of cigarettes and marijuana—into the facility with the assistance of Martin's wife. According to Martin, his wife would place contraband on the automobile used jointly by Robinson and Perry while the vehicle was in the LCDC parking lot. Martin alleged that Robinson and Perry would then bring the contraband into the LCDC during their shift.

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*Senior Judge Russell heard oral argument in this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. 28 U.S.C. § 46(d).

[2]Robinson named Lexington County, South Carolina, Sheriff James R. Metts and Lexington County Detention Center employees Detective Glenn Oxendine, Captain Adrian Bost, Sergeant Duane R. Peake, Detective Anthony Plante, Detective Jimmy Smith, Detective Larry Harrison, Detective Jim Graham, and Detective Ken Correll as defendants in this action. For ease of reference, we refer to defendants collectively as "Appellees."

Pursuant to information provided by Martin, Appellees prepared a package containing a carton of cigarettes, marijuana, three $20.00 bills, cigarette lighters, and rolling papers. On June 18, 1992, Appellees placed the package in the wheel well of the vehicle used by Robinson and Perry in the LCDC parking lot, as directed by Martin, and established surveillance. During the vigil, Martin notified officers that Robinson and Perry had told him that they knew the contraband was there and that they would bring it to him. No one approached the vehicle until the following morning when Robinson and Perry went off duty and left the LCDC.

The automobile was kept under observation after it exited the parking lot. The vehicle stopped on an interstate entrance ramp; Perry exited, retrieved the package from the wheel well, and again entered the automobile. Shortly thereafter, the vehicle was stopped, and Robinson and Perry were searched and arrested. Three $20.00 bills and marijuana were discovered in Perry's pockets, and the remaining contraband was on the floorboard of the automobile.[3]

A grand jury indicted Robinson of several violations of state law including conspiracy to possess marijuana and misconduct in office. On the day before Robinson's scheduled trial, the state court heard Robinson's motion to dismiss the charges on the basis that probable cause was lacking for the search and seizure. Following an evidentiary hearing, the state court ruled that probable cause had existed and denied Robinson's motion to dismiss. Robinson thereafter entered a plea pursuant to an agreement permitting him to enter a pretrial intervention program.

Robinson subsequently brought the present action claiming that his rights under federal and state law were violated by Appellees because, *inter alia*, they lacked probable cause for the search, seizure, and prosecution. The district court granted summary judgment to Appellees, ruling that Robinson was estopped from arguing that probable cause was lacking due to the contrary determination by the state court during Robinson's criminal proceedings. Furthermore, the district court concluded that Appellees were entitled to qualified immunity because a reasonable officer could have believed that probable cause was present.

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[3]Perry is not a party to this action.

II.

Robinson maintains that the district court erred in granting summary judgment to Appellees, principally contending that he is not estopped from challenging the probable cause determination of the state court and that probable cause was lacking. Having had the benefit of oral argument and the parties' briefs, and after careful consideration of the record and applicable law, we conclude that the district court correctly decided the issues before it. Accordingly, we affirm on the reasoning of the district court. *See Robinson v. Metts*, No. 3:95-1866-23 (D.S.C. Mar. 17, 1997).

AFFIRMED

APPENDIX B – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED SEPTEMBER 13, 1999

97-1527
CA-95-1866-3-23

Order Upon Petition for Rehearing and Rehearing *En Banc*

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As nomember of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opionion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Clerk

Filed September 13, 1999

APPENDIX C- ORDER OF UNITED STATES THE DISTICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT COLUMBIA FILED MARCH 17, 1997

C.A. #: 3:95-1866-23

This matter is before the court on defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56. Oral arguments were heard on November 6, 1996, and the court took the motion under advisement. Upon further consideration, the court hereby grants defendants' motion for summary judgment.

I. BACKGROUND

On or about June 13, 1992, in the course of his investigation of suspected smuggling of contraband into the Lexington County Detention Center ("LCDC"), defendant Detective Glenn Oxendine observed a visitor pass a $20.00 bill to an inmate. Shortly thereafter, two inmates were detained by the correctional officer on duty, and the visitor was questioned by defendant Oxendine. The visitor was the mother of Gary Martin ("Martin"), one of the inmates detained by the correctional officer. Martin informed LCDC authorities that contraband, specifically cigarettes and marijuana, was being brought into the LCDC for inmates by two correctional officers, plaintiff and Harry Perry. Defendant Oxendine was provided with a written statement containing that information. Further interviews were conducted with Martin who informed defendants Oxendine and Peake that the contraband was being supplied by Martin's wife who would place it on a vehicle used by plaintiff and Perry while the vehicle was in the LCDC parking lot. The contraband was then retrieved and brought into the LCDC during plaintiff and Perry's shift.

Martin further informed defendants Oxendine and Peake that a deal had been set up for plaintiff and Perry to bring in a carton of cigarettes and some marijuana for Martin. With the cooperation of Martin, defendants Oxendine and Peake scheduled the transfer, which was ultimately to take place on the evening of June 18 or the morning of June 19. [2] On June 18, defendants Oxendine and Peake prepared a package of contraband consisting of a carton of cigarettes, marijuana, three $20.00 bills, some lighters, and cigarette rolling papers. On the evening of June 18, all of the defendants, except defendant Metts, set up surveillance on plaintiff's vehicle in the LCDC parking lot. Because a white female law enforcement law officer could not be located, the wife of one of the defendants was used to place the contraband on the left rear wheel of the vehicle as specified by Martin. During the course of surveillance, Martin informed defendant Oxendine by telephone that plaintiff and Perry knew that the contraband was in place and that they had told Martin they would pick it up and bring to him.

No one was seen near the vehicle until plaintiff and Perry left the LCDC on the morning of June 19. At that time they did not approach the left rear wheel where the package had been. After Plaintiff and Perry drove away, defendants

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[1] In his opposition to defendants' motion for summary judgment, plaintiff asserts thatthere are factual inconsistencies between defendants' statement of facts in their memorandum and defendant Oxendine's deposition concerning his investigation. Defendants' statement of facts correlates with the transcript of the state court pre-trial proceeding. Nonetheless, upon reviewing the transcript of the state court pre-trial proceeding and Oxendine's deposition, the court finds no direct contradiction that would undermine the validity of the state court judge's ruling and it preclusive effect in the present case discussed infra p. 7-11.

[2] The transfer was originally to occur on June 17, but Perry told Martin that he was going to be ill on the 17th, and it was rescheduled.

determined that the package was not in the parking lot. The vehicle was kept under continued surveillance after leaving the parking lot and was later stopped on an interstate highway entrance ramp. Plaintiff exited the vehicle and retrieved the contraband from the left rear wheel and went back into the vehicle, which then proceeded on the interstate. The vehicle left the interstate and proceeded toward Lexington, South Carolina. At that time, plaintiff and Perry were stopped, searched, and arrested.

During the search, the contraband was recovered, and plaintiff was charged with "conspiracy to possess with intent to distribute marijuana" and "possession with intent to distribute marijuana" and was indicted by Lexington County Grand Jury on October 22, 1992. On November 22, 1994, the Grand Jury returned additional indictments arising out of the same incident against plaintiff on two counts of "misconduct in office" and two counts of "contraband- county or municipal prisoner." Plaintiff contends that the contraband was "planted" by defendants.

Plaintiff's trial was set for February 14, 1996, and on February 13, 1996, pre-trial motions were heard, including a motion to dismiss, where the judge determined that probable cause did exist for the initial arrest and the subsequent search of plaintiff and Perry. After a jury had been drawn on February 14, plaintiff entered into a plea bargain whereby he was permitted to enter the Pre-Trial Intervention Program ("PTI") on the indictments for two counts of "misconduct in office" and two counts of "contraband- county or municipal prisoner." As part of the plea bargain, the other charges were dismissed.

Plaintiff filed the original complaint in this case on June 19, 1995. In his amended complaint filed on June 27, 1996, plaintiff alleges illegal seizure in violation of the Fourth Amendment, illegal search pursuant to the Fourth Amendment, civil conspiracy under 42 U.S.C §§ 1983 and 1985, and mali-

cious prosecution. Plaintiff further alleges that defendant Metts is liable for the conduct of the deputies in his employ and that defendant Metts violated plaintiff's constitutional rights and 42 U.S.C. §1983.

II. SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weight the evidence, but rather to determine if there is a genuine issue for trial. **Anderson v. Liberty Lobby, Inc.,** 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof at trial. **Celotex Corp. v. Catrett,** 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. **Perini corp. v. Perini Constr., Inc.,** 915 F. 2d 121, 123-24 (4th Cir. 1990). "(W)here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." **Teamsters Joint Council No. 83 v. Centra, Inc.,** 947 F.2d 115, 119 (4th Cir. 1991). "(T)he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." **Celotex,** 477 U.S. at 322. Finally, the "obligation of the non-moving party is 'particularly strong when the non-moving party bears the burden of proof'". **Hughes v. Bedsole,** 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting **Pachaly v. City of Lynchburg,** 897 F.2d 723, 725 (4th Cir. 1990)), **cert. denied,** 116 S. Ct. 190 (995).

II. ANALYSIS

A. PROBABLE CAUSE AND COLLATERAL ESTOPPEL

Defendants assert that the state court's ruling in the previous pre-trial criminal proceedings in regard to plaintiff's motion to dismiss, where the judge found that there was probable cause, defeats plaintiff's claims of illegal search and seizure and malicious prosecution because the issue is precluded from being re-litigated by virtue of collateral estoppel. Under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party of the first case." **Allen v. McCurry,** 449 U.S. 90, 94 (1980). The party against whom the collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding. **Id.** In **Gray v. Farley,** 13 F.3d 142 (4th Cir. 1993), the Fourth Circuit, relying on **Allen,** held that a suppression hearing in an earlier state criminal trial collaterally estopped re-litigation of the same issues in a subsequent § 1983 action. **Id.** At 146-47 ("A suppression hearing in an earlier state criminal proceeding collaterally estops the re-litigation of the same issues in § 1983 action if the elements of collateral estoppel are met."). Furthermore, the Fourth Circuit has observed that:

> (r)ecent decisions from the South Carolina courts indicate that issue preclusion is proper if the issue in question was presented in a prior adjudicatory proceeding in which the party against whom preclusion is sought had a full and fair opportunity to litigate the issue.

Stall v. Bourne, 774 F.2d 657, 663 (4th Cir. 1985) (citations omitted).

In the state court criminal proceedings against plaintiff, a number of pre-trial motions were filed, including a motion to dismiss for lack of probable cause to arrest. These motions were heard by the Honorable Marc H. Westbrook, Judge of the Eleventh Judicial Circuit, on February 13, 1996. After hearing oral arguments, Judge Westbrook stated:

> Counsel, I'm going to find from the entirety of the record in this probable cause hearing that has been presented to me that the fact presented, again, in their totality, are reliable and credible and sufficient to cause a reasonable person to believe that the suspects, in this case the defendants, both defendants, were involved in committing a crime or had committed a crime. With that in mind, I'm going to deny the motion to dismiss.

(Tr. at pp. 104-05). Although Judge Westbrook's ruling was not during actual trial, the Fourth Circuit has state that:

> As long as the prior adjudication of the identical issue is conclusive, we see no reason to require the issue to be tried again because it lacked the formality of an express order.... Finality for purposes of collateral estoppel is a flexible concept and "may mean little more than that the litigation of a particular issue has been reached such a stage that a court sees no really good reason for permitting it to be litigated again."

Swentek v. USAir, Inc., 830 F2d 552, 561 (4th cir. 1987) (citations omitted). Upon reviewing the transcript of the February 13, 1996 hearing, this court finds that plaintiff had a full and fair opportunity to litigate the issue of probable cause in the state court criminal proceedings and is therefore collaterally estopped by the state court's previous ruling from re-litigating the issue of probable cause in the present case. **See Graham v.**

State Farm Fire & Casualty Inc., Co., 287 S.E.2d 495, 496 (S.C. 1982).

1. **Claims of Illegal Search and Seizure**

Plaintiff's first and second causes of action allege illegal search and seizure in violation of the fourth Amendment. The Fourth Amendment permits an officer to search a person placed under arrest as an incident to the arrest itself. **Levinson-Roth v. Parries,** 872 F. Supp. 1439, 1449 (D. Md. 1995). The legality of an arrest and subsequent search incident to that arrest turn on whether the arresting officer had probable cause to arrest the Plaintiff at the time the arrest occurred. **U. S. v. Miller,** 925 F.2d 695, 698 (4th Cir. 1991). Thus, in light of the state court proceedings and the state judge's finding of the existence of probable cause, defendants are entitled to summary judgment as to plaintiff's claims for illegal search and seizure in violation of Fourth Amendment.

2. **Malicious Presecution**

Plaintiff's fourth cause of action alleges malicious prosecution in violation of 42 U.S.C. § 1983. To prove his claim under § 1983, plaintiff must show a malicious prosecution under South Carolina law that resulted in a deprivation of his constitutional rights. **See Goodwin v. Metts,** 885 F.2d 157, 160 n. 1 (4th cir. 1989). In order to recover for malicious prosecution under South Carolina law, plaintiff must show (1) the institution or continuation of original judicial proceedings, civil or criminal; (2) by, or at the instance of, the defendant; (3) the termination of such proceeding in plaintiff's favor; (4) malice of defendant in instituting such proceedings; (5) want of probable cause; and (6) resulting injury or damage. **Ruff v. Eckerds Drugs, Inc.,** 220 S.E. 2d 649, 652 (1975) (citing **Parrott v. Plowden Motor Company,** 143 S.E. 2d 607 (1965)). Accordingly, defen-

dants are also entitled to summary judgment as to plaintiff's claim of malicious prosecution due to the state judge's finding of the existence of probable cause.

Furthermore, plaintiff's claim fails because the criminal prosecution was not terminated in his favor. Dismissal of charges a result of entry into PTI is not termination of proceedings in plaintiff's favor. **Jordan v. Reese,**452 S.E.2d 838, 839 (S.C. 1995).

B. CIVIL CONSPIRACY

Plaintiff's third cause of action alleges a civil conspiracy among the defendants. To be successful on a claim for civil conspiracy in South Carolina, the plaintiff must show (1) a combination of two or more person; (2) for the purposes of injuring the plaintiff; (3) causing the plaintiff special damages. **Vaught v. Waites,** 387 S.E.2d 91, 95 (S.C. Ct. App. 1989) (citing **Lee v. Chesterfield Gen. Hosp. Inc.,** 344 S.E.2d 379 (S.C. Ct. App. 1986)). In the present case, plaintiff alleges special damages, but he has failed to specify the nature of the alleged special damages arising out of the conspiracy. Furthermore, the court finds no evidence showing that plaintiff suffered special damages.

In addition, a claim for civil conspiracy must allege additional facts in furtherance of a conspiracy rather than re-allege other claims. **Todd v. South Carolina Farm Bureau Mutual Ins. Co.,** 278 S.E.2d 607, 611 (S.C. 1981). Plaintiff has incorporated by reference the alleged acts of defendants from his preceding allegations and to support his claim merely added conclusory allegations that defendants were engaged in a conspiracy. Where "(t)he only alleged wrongful acts plead are those for which damages have already been sought," plaintiff's claim for civil conspiracy fails. **Id.**

Additionally, to establish a civil conspiracy under § 1983, plaintiff must show that defendants acted in concert in furtherance of the conspiracy which resulted in plaintiff's deprivation of a constitutional right. **Hinkle v. City of Clarksburg, W.Va.,** 81 F.3d 416, 421 (4th Cir. 1996) (citing **Hafner v. Brown,** 983 F.2d 570, 577 (4th Cir. 1992)). In order "to survive a properly supported summary judgment motion (plaintiff's) evidence must, at least, reasonably lead to the inference that (defendants) positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan." **Hinkle,** 81 F.3d at 421. There has been no such evidence presented by plaintiff in the present case. Thus, defendants are entitled to summary judgment as to plaintiff's civil conspiracy claim.

B. SHERIFF METTS

Plaintiff's final cause of action alleges that defendant Metts is liable for the alleged wrongful acts of his deputies and that he violated plaintiff's civil rights under § 1983.

1. State Law Claim under § 23-13-10

Assuming this cause of action alleges a state law claim under S.C. Code Ann. § 23-13-10[3], the court finds that § 23-13-10 is not applicable to the present case because the statute has been repealed by implication with the enactment of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, **et seq.,** ("SCTCA"). With the enactment of the SCTCA, the South Carolina legislature intended the tort liability of the State and its political subdivisions to be lim-

---

[3] Although a state law claim under § 23-13-10 is not specifically alleged in his complaint, plaintiff asserts that he has a valid claim under § 23-13-10 in his response to defendants' motion for summary judgment. Therefore, the court is considering the cause of action as including such a claim.

ited to the SCTCA[4] and specifically provided that the SCTCA was the exclusive remedy available for torts by the State, its political subdivisions, and employees acting within the scope of official duty.[5] The SCTCA clearly applies to a Sheriff and his deputies because the term "employee" is defined in the SCTCA as including elected officials and law enforcement officers. S.C. Code ann. § 15-78-30(c) (Law. Co-op. Supp. 1995).

Thus, if § 23-13-10 were to allow a cause of action against the Sheriff in the present case, it would be in direct conflict with SCTCA. It is well settled that if two statutes conflict, the statute most recently passed should prevail so as to repeal the earlier statute to the extent of the repugnancy. **Hair v. State,** 406 S.E.2d 332, 334 (S.C. 1991). The SCTCA is the more recent legislation and must prevail over § 23-13-10. Accordingly, plaintiff's fifth cause of action fails to state a state law claim on which relief may be granted, and defendant Metts is entitled to summary judgment as to that claim.

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[4] Section 15-78-20(a) provides in pertinent part that "...it is declared to be the public policy of the State of South Carolina that the State, and it political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein..."

[5] Section 17-78-2-(b) provides in pertinent part that the General Assembly "....intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty only to the extent provided herein. All other immunities applicable to a governmental entity, its employees and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil remedy avail able for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)." Furthermore, § 15-78-70(a) provides that: "This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor [sic] except as expressly provided for in [15-78-70(b)]."

2. **Claim Under 42 U.S. C. §1983**

Plaintiff alleges that defendant Metts violated § 1983 in that he adopted, ratified, and condoned unconstitutional law enforcement practices. However, there can be no supervisory liability against defendant Metts under § 1983 without a violation of plaintiff's constitutional rights by one of the other defendants. **Hinkle,** 81 F.3d at 420; **Temkin v. Frederick County Commissioners,** 945 F.2d 716, 724 (4th Cir. 1991). Because the court has found no liability with respect to the other defendants, as discussed **supra**, defendant Metts cannot be liable in supervisory capacity.

C. **QUALIFIED IMMUNITY**

In addition to finding plaintiff's claims to be without merit, the court also finds that defendants are entitled to qualified immunity as to plaintiff's first, second, and fourth causes of action because they had an objectively reasonable belief that probable cause existed that plaintiff had committed or was committing a criminal offense. It is well established that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have know." **Harlow v. Fitzgerald,** 457 U.S. 800, 818 (1982) (citations omitted). The court must consider the "objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken." **Anderson v. Creighton,** 483 U.S. 635, 639 (1987) (citations omitted). Determining whether an officer is entitled to qualified immunity is particularly appropriate at the summary judgment stage. **Torchinsky v. Siwinski,** 942 F.2d 257, 261 (4th Cir. 1991) In light of Judge Westbrook's determination in the previous

state court criminal proceeding that probable cause existed, the court finds that defendants had a reasonable belief that probable cause existed to stop, search, arrest, and prosecute plaintiff entitling them to qualified immunity as to plaintiff's first, second, and fourth causes of action.

IV. CONCLUSION

For the foregoing reasons, this court finds no genuine issue as to any material fact. It is therefore,

ORDERED that defendants' motion for summary judgment is **GRANTED.**

AND IT IS SO ORDERED.[6]

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[6] In light of the court's ruling on defendants' motion for summary judgment, defendants' motion to consolidate is MOOT.

Supreme Court, U.S.
FILED
JAN 11 2000
CLERK

(2)

No. 99-996

IN THE

Supreme Court of the United States

BRUCE LEON ROBINSON,

Petitioner,

v.

JAMES R. METTS,
SHERIFF OF LEXINGTON COUNTY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant a writ of certiorari to determine whether collateral estoppel was properly applied to preclude the re-litigation of the issue of lack of probable cause in connection with Fourth Amendment claims under 42 U.S.C. § 1983, where the courts below correctly applied earlier decisions of this court in holding that the prior state court finding of probable cause to arrest was final and that the Petitioner had a full and fair opportunity to litigate the issue of probable cause?

PARTIES TO THE PROCEEDING

The parties identified by the Petitioner as being the parties before the Court of Appeals are correct as stated. However, the listing of additional parties to the proceeding in the District Court is incorrect, as none of the individuals or entities there listed were parties in the Amended Complaint upon which the District Court granted summary judgment to the Respondents.

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STATEMENT OF THE CASE

This action arises out of the arrest of the Petitioner, who was then a county correctional officer, following an investigation of allegations by an inmate that the Petitioner and another correctional officer were smuggling marijuana and cigarettes to inmates in the detention center. The Petitioner was arrested and charged with "Conspiracy to Possess With Intent to Distribute Marijuana" and "Possession With Intent to Distribute Marijuana", and was indicted by the Grand Jury on those charges and four (4) other counts arising out of the same incident. While awaiting his state court criminal trial the Petitioner filed his original Complaint in the United States District Court under 42 U.S.C. § 1983 asserting claims for, *inter alia*, illegal seizure, illegal search, and malicious prosecution. The Respondents moved to dismiss the Complaint, and at the hearing on those motions all proceedings were stayed pending resolution of the criminal charges.

Petitioner's trial on the six (6) indictments was scheduled for February 14, 1996, and on February 13, 1996 a hearing on the pre-trial motions of the Petitioner and his co-defendant, each of whom was represented by separate counsel, was held before the state trial judge. One of the motions heard was the Petitioner's motion to dismiss all charges for lack of probable cause to arrest, and during that hearing one of the Respondent arresting officers was vigorously cross examined by counsel for both the Petitioner and his co-defendant, who also offered evidence which was accepted by the court. After hearing extensive testimony and argument the state trial judge ruled that probable cause to arrest existed and denied the Petitioner's motion to dismiss.

The following day, and after the jury had been drawn, the Petitioner entered into a plea bargain whereby he was permitted to participate in a pre-trial intervention program on indictments for the two counts of "Misconduct in Office" and the two counts of "Contraband" which arose out of the same incident. At the same time, and as a part of the plea bargain, prosecution was ended without prejudice as to all counts, including the indictments for "Conspiracy to Possess With Intent to Distribute Marijuana" and "Possession With Intent to Distribute Marijuana", but with leave to re-indict on all counts if the Petitioner failed to successfully complete pre-trial intervention.

Thereafter, with leave of the District Court the Petitioner served an Amended Complaint in which he reasserted his claims under § 1983 for illegal seizure, illegal search, and malicious prosecution. The Respondents answered asserting several defenses including collateral estoppel, probable cause, and qualified immunity. The Respondents thereafter moved for summary judgment asserting, *inter alia*, that the Petitioner was collaterally estopped from relitigating the issue of probable cause, which had been decided adversely to the Petitioner in the state criminal proceedings, and that the Respondents were entitled to qualified immunity. The District Court held that, based on its review of the transcript of the pre-trial hearing on the motion to dismiss, the Petitioner had a full and fair opportunity to litigate the issue of probable cause in the state court criminal proceeding and was therefore collaterally estopped by the state court ruling from re-litigating the issue of probable cause. The District Court further held that the Respondents were entitled to qualified immunity because they had an objectively reasonable belief that the Petitioner had committed or was committing a criminal offense. On appeal, the Fourth Circuit

Court of Appeals concluded that the District Court correctly decided the issues before it and affirmed based on the reasoning of the District Court. Petitioner's subsequent petition for rehearing and rehearing *en banc* was denied.

The foregoing sets forth the pertinent factual and procedural posture of this case. To the extent that more factual specificity may be desired, the Respondents incorporate and adopt by reference the facts as set out under "Background" in the order of the District Court. (*See* Appendix at 1e-1h). In his Petition (hereinafter Pet.) Robinson makes a number of factual assertions which are neither accurate nor supported by the record below, and which convey an inaccurate impression of pertinent portions of the proceedings and the facts below. Significantly, a number of these inaccuracies form the foundation for the Petitioner's arguments with regard to the asserted lack of finality of the state court ruling, and of the Petitioner's purported inability to fully and fairly litigate the issue of probable cause in the underlying state court criminal case. As required by Supreme Court Rule 15.2 the Respondents make the following corrections and/or clarifications to the factual assertions set forth in Robinson's Petition.

A. The petition misrepresents the nature of the state court pre-trial hearing

Petitioner asserts, that "The issue upon which the state Court convened, **that being the guilt or innocence of the criminal charges**, in no way included the issue of the legality of arrest, search or seizure." (Pet. p. 7, emphasis added). This is a serious misstatement of the nature of the state court proceedings which produced the judgment which is the basis for collateral estoppel in this case. *See also* Pet. p. 9 (asserting

that the issues in the criminal case are irrelevant to the present case). The state court proceeding here at issue did not involve the Petitioner's guilt or innocence on the criminal charges. To the contrary, the state court proceeding was a pre-trial hearing on the Petitioner's motion to dismiss all criminal charges, **on the specific grounds that the Respondents lacked probable cause to arrest him**. This is clearly established in the record below by the transcript of the February 13, 1996 state court motions hearing. At that time, in response to the court's inquiry as to the first motion, the Petitioner's counsel stated:

> The first one is probably the most important (sic) would be a **probable cause hearing or dismiss or quash on the grounds there was not probable cause for the initial arrest** and everything that existed came out of that initial arrest. **We would ask at this time to do a probable cause hearing.**

(*See* J.A. at 270 *l.* 23-271 *l.* 3) (emphasis added). So too, at the conclusion of argument on that motion the trial judge stated:

> Counsel, I'm going to find from the entirety of the record **in this probable cause hearing** that has been presented to me that the facts presented, again, in their totality are reliable and credible and sufficiently (sic) to cause a reasonable person to believe that the suspects in this case the defendants, both defendants, were involved in committing a crime or had committed a crime. With that in mind I'm going to deny the motion to dismiss.

(*See* Appendix at 1j, emphasis added). There can be no doubt that the "legality of arrest, search or seizure", as determined by the state court's holding that probable cause existed, was the specific issue before the court during the pre-trial hearings.

B. The petition misrepresents the facts and circumstances relevant to the dismissal of criminal charges pursuant to Robinson's plea bargain following the denial of his motion to dismiss for lack of probable cause.

In his petition Robinson sets out his version of what transpired the day following the denial of his motion to dismiss the indictments against him on unspecified Fourth Amendment grounds (*See* Pet. p. 6), the specific grounds in fact being lack of probable cause to arrest. (*See* J.A. p. 270 *l.* 23 - 271 *l.* 3). He asserts that the prosecutor "unilaterally decided to dismiss **the criminal charges at issue**", allowed him "to attend pre-trial intervention **on other charges**", and that "The **drug charges were dropped** and following successful completion of the pre-trial intervention program-the misconduct in office and contraband charges **were dismissed as well**." (Pet. p. 6-7, emphasis added). Contrary to the inference created by Petitioner's assertions that the dismissal of the "drug charges" was unconditional and unrelated to the dismissal of the other four charges, there is no evidence that the prosecutor's actions as to the several indictments were either unilateral or unrelated as the Petitioner implies.

Rather, it is established by the record below that by the terms of the plea bargain the Petitioner was permitted to enter pre-trial intervention on four (4) misdemeanor indictments,

and prosecution was **conditionally** ended on those indictments, as well as on the two (2) felony indictments for "Possession with Intent to Distribute Marijuana" and "Conspiracy to Possess with Intent to Distribute Marijuana". The latter two (2) indictments appear to be the ones the Petitioner refers to as "**the criminal charges at issue** in this case". Each of the six (6) indictments was endorsed with the following identical language: **"2/14/96 Prosecution ended without prejudice w/ leave to reindict, pending successful completion of PTI."** (*See* J.A. pgs. 462 - 473, emphasis added). So too, the record below establishes that it was made clear in the proceedings before the state trial judge that the plea bargain was a "package deal" dismissing all six (6) indictments, contingent on completion of PTI, and that if the Petitioner did not successfully complete PTI the prosecutor could then proceed on all six indictments. (*See* J.A. p. 459 *l.* 14 - 24).

Similarly, there is no evidence that it was a "unilateral decision of the prosecutor" which purportedly "took away any avenue to review the state Judge's ruling." (Pet. p. 7). Rather, the record below (*See* J.A. p. 460 *l.* 7-25) establishes that what prevented further review of the trial court's finding of probable cause was the knowing and voluntary decision by the Petitioner, with the advice of his retained counsel, to go into pre-trial intervention rather than go forward with the jury trial. The state trial judge at that time specifically informed Robinson that it was Petitioner's decision as to whether to go into pre-trial intervention or to have a jury trial, and that a jury was standing by in the jury room if he wanted a trial. Robinson then and there acknowledged that he had talked to his lawyer about pre-trial intervention and that it was his decision to waive the jury trial.

REASONS FOR DENYING THE WRIT

As set out above, and contrary to the Petitioner's assertions, collateral estoppel was correctly applied below to preclude relitigation of the existence of probable cause to arrest, the specific issue determined in the state court motion hearing. So too, state court appeal of the finding of probable cause to arrest was precluded by the Petitioner's voluntary entry into a plea bargain, not by any unilateral action of the prosecutor.

The claim in Robinson's factually inaccurate petition appears to be that the opinion below conflicts with prior rulings of this court, presumably that the Petitioner must have had a full and fair opportunity to litigate his claim. The gravamen of the Petitioner's argument appears to be that because he did not have an opportunity to appeal, the judgment below was not final and he therefore had only a partial, as opposed to a full and fair, opportunity to litigate the issue of probable cause. The decision below was plainly a correct application of settled law, and does not warrant review by this Court.

A. The state court ruling denying the Petitioner's pre-trial motion to dismiss all criminal charges for lack of probable cause to arrest was final for purposes of collateral estoppel which properly barred relitigation of probable cause in the action under 42 U.S.C. § 1983

Petitioner's argument that the finding of probable cause by the state court should not be given preclusive effect because it was not final for purposes of appeal is without merit. Even if the purported quotation from *State v. McMillan*, 189 S.C. 444, 1 S.E.2d 626 (1939) could be found

in that case, it has no merit or application in the context of collateral estoppel. "[F]inality for purposes of appeal . . . is not necessarily the finality that is required for issue preclusion purposes. The availability of judicial review is merely one factor to consider in determining whether issue preclusion applies." *John Morrell & Company v. Local Union 304A*, 913 F.2d 544, 563 (8th Cir. 1990), *cert. denied*, 500 U.S. 905, 111 S. Ct. 1683, 114 L. Ed. 2d 78 (1991). The Third Circuit has likewise noted that, "[u]nlike claim preclusion, the effectiveness of issue preclusion, sometimes called collateral estoppel, does not require the entry of a judgment, final in the sense of being appealable." *In Re: Brown*, 951 F.2d 564, 569 (3rd Cir. 1991), *citing* Restatement (Second) of Judgments § 13 (1982). Similar holdings are found in other circuits including the Fifth, *Cycles, Ltd. v. Navistar Financial Corporation*, 37 F.3d 1088, 1091 (5th Cir. 1994); Seventh, *Carr v. CIGNA Securities, Inc.*, 95 F.3d 544, 546 (7th Cir. 1996); and Federal, *Pharmacia & Upjohn v. Mylan Pharmaceuticals, Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999).

The law is well settled that, as stated in pertinent part in Restatement (Second) Judgments, § 13 (1982) ". . . for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." This statement of the rule is quoted favorably in *Luben Industries, Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983) and in *Miller Brewing Company v. Jos. Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102, 100 S. Ct. 1067, 62 L. Ed. 2d 787 (1980). In *Miller* the court further held that "[t]o be 'final' for purposes of collateral estoppel the decision need only be immune, as a practical

matter, to reversal or amendment." *Id.* Collateral estoppel does not require a judgment which ends the litigation and leaves nothing for the court to do but execute the judgment, but includes many dispositions which, though not final in that sense, have nevertheless been fully litigated. *Metromedia Co. v. Fugazy*, 983 F.2d 350, 366 (2nd Cir. 1992), *cert. denied*, 508 U.S. 952, 113 S. Ct. 2445, 124 L. Ed. 2d 662 (1993).

In this regard, a number of courts have quoted with approval Judge Friendly's observation in *Lummus Company v. Commonwealth Oil Refining Co.*, 297 F.2d 80 (2nd Cir. 1961), *cert. denied*, 368 U.S. 986, 82 S. Ct. 601, 7 L. Ed. 2d 524 (1962) that, " 'Finality' in the context here relevant [collateral estoppel] may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Id.* at 89. *See e.g.*, *O'Reilly v. Malon*, 747 F.2d 820, 823 (1st Cir. 1984); *Dyndul v. Dyndul*, 620 F.2d 409, 412 n.8 (3rd Cir. 1980); and *Swentek v. USAIR, Inc.*, 830 F.2d 552, 561 (4th Cir. 1987). Indeed, it is that statement, as quoted by the Fourth Circuit in *Swentek*, upon which the District Court relied in the present case. (*See* App. 1j).

In *John Morrell & Company v. Local Union 304A*, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, 500 U.S. 905, 111 S. Ct. 1683, 114 L. Ed. 2d 78 (1991), the court observed that, "[r]ecent decisions have relaxed traditional views of the finality requirement by applying issue preclusion to matters resolved by preliminary rulings. . . ." *Id.* at 564. In this regard, although not specifically addressing the issue of finality, Courts of Appeal in the Sixth, Seventh, Tenth, and Eleventh Circuits have sustained the application of collateral estoppel to bar relitigation of Fourth Amendment issues in actions under 42 U.S.C. § 1983, where appellate review of

preliminary rulings in state court criminal proceedings had been foreclosed.

In *Smith v. Thornburg*, 136 F.3d 1070 (6th Cir. 1998), *rehearing denied*, 144 F.3d 409 (6th Cir. 1998), appeal from a finding of probable cause in a state court preliminary hearing had been precluded when the grand jury subsequently dismissed the charges. On appeal from the district court's grant of summary judgment in the subsequent § 1983 action for violation of Fourth Amendment rights, the court of appeals held that where the plaintiff's counsel had examined several witnesses, the accused had been afforded a full and fair opportunity to litigate the existence of probable cause, and was therefore barred by collateral estoppel from relitigating the issue in his § 1983 action. *Id.* at 1077. *See also Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir. 1987) applying collateral estoppel to bar relitigation of probable cause in a § 1983 action, where appeal from a state court finding of probable cause at a pre-trial motion to quash had been precluded by dismissal of the charges for failure to provide a speedy trial.

The Tenth Circuit likewise applied collateral estoppel to bar relitigation of the issue of probable cause in *Hubbert v. City of Moore, Okl.*, 923 F.2d 769 (10th Cir. 1991). There, probable cause to arrest had been found in a state court preliminary hearing at which Hubbert was represented by counsel who cross examined the arresting officers. Appeal from the state court finding of probable cause was precluded by the acquittal of the accused, who thereafter brought an action in federal court under § 1983 asserting that her arrest had been without probable cause. The Tenth Circuit held that Hubbert was estopped from relitigating the issue of probable cause in the § 1983 action as "the question of

probable cause is conclusively determined at a preliminary hearing when the parties have had a full and fair opportunity to litigate that issue." *Id.* at 773. The court specifically rejected Hubbert's contention that there was a genuine issue of fact as to whether she had been denied a full and fair opportunity to litigate the issue of probable cause because the preliminary hearing was "tainted" by false or misleading testimony of the arresting officers. In so doing the court noted that it's review of the record revealed that Hubbert had an opportunity to fully and fairly litigate the issue as:

> Her counsel had ample opportunity to present evidence, review evidence the prosecution presented, and cross examine the witnesses against her. We hold no genuine issue of fact remains because probable cause was fully and fairly litigated in the prior criminal proceeding and cannot be relitigated in this civil action.

Id. at 773.

In *Guenther v. Holmgreen*, 738 F.2d 879 (7th Cir. 1984), *cert. denied*, 469 U.S. 1212, 105 S. Ct. 1182, 84 L. Ed. 2d 329 (1985), the Seventh Circuit affirmed the application of collateral estoppel to bar relitigation of probable cause in a § 1983 action brought following the acquittal of the accused in a state criminal action. Probable cause to arrest the accused had been found, and his motion to dismiss on that ground had been denied, in a preliminary state court evidentiary hearing prior to being acquitted. In affirming the grant of summary judgment on the basis of collateral estoppel the court observed that:

> . . . since Guenther invited a state criminal proceeding which permitted him to fully and fairly litigate both the sufficiency and the integrity of the evidence supporting probable cause, the policies underlying the collateral estoppel doctrine–judicial economy and consistency of judgments–would be frustrated if we were to permit him to relitigate those claims in federal court. In passing § 1983, "[Congress did not intend] to allow relitigation after a full and fair hearing simply because the state court's decision may have been erroneous." *Allen v. McCurry*, 449 U.S. at 101, 101 S. Ct. at 418.

Id. at 889.

So too, in *Coney v. Smith*, 738 F.2d 1199 (11th Cir. 1984), the Eleventh Circuit affirmed, *per curiam*, the application of collateral estoppel in a § 1983 action to bar relitigation of the issue of the legality of the arrest and search of the accused. Appellate review of the state court ruling on the legality of the arrest had been precluded by a subsequent guilty plea. The court there recognized that this Court held in *Haring v. Prosise*, 462 U.S. 306, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983) that a defendant convicted on a guilty plea in state court is not precluded by collateral estoppel "from seeking recovery of damages under § 1983 for alleged Fourth Amendment violations *that were never considered in state proceedings.*" *Id.* at 1199 (italics added by the court). The court held however that "Coney litigated the issue of illegality of arrest and search **prior to his plea of guilty**." and *Haring* therefore did not apply. (*Id.* at 1200, emphasis added).

From the standpoint of finality, the present case is factually similar to *Smith*, *Coogan*, *Hubbert*, *Guenther*, and *Coney*, where appeal from the finding of probable cause at the preliminary motions stage of the state criminal proceedings was precluded by subsequent dismissal or acquittal of the accused. Here also, the Petitioner cross examined witnesses and offered evidence which was accepted by the court. This Court held in *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) that in order to have preclusive effect, the prior state proceeding must have afforded a full and fair opportunity to litigate the issue. Subsequently, the Court clarified this requirement when it held in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982) that: "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Id.* at 481, 102 S. Ct. at 1897. There can be no doubt that these requirements were met in the state court proceeding in the present case.

This case differs somewhat from *Smith*, *Coogan*, *Hubbert*, *Guenther*, and *Coney*, in that here the dismissal precluding appellate review was the result of a voluntary plea bargain. In that regard however, this case is similar to the Fourth Circuit case of *Leonard v. George*, 178 F.2d 312 (4th Cir. 1949), *cert. denied*, 339 U.S. 965, 70 S. Ct. 1000, 94 L. Ed. 1374 (1950). In *Leonard* the plaintiff procured the dismissal of criminal charges against him by means of a compromise in which he paid a sum of money to the party who had sworn out the criminal warrant against him. He then brought an action for malicious prosecution. Applying South Carolina law the Fourth Circuit held that by procuring the dismissal of the charges by means of a compromise, the plaintiff was estopped from relitigating the issue of probable

cause in the later malicious prosecution action. In so holding the court observed that:

> The basis of the rule is . . . that **the plaintiff, by entering into the compromise and securing the dismissal of the criminal action thereby, estops himself from contending that it was instituted without probable cause.**

Id. at 314 (citation omitted, emphasis added). Just as the plaintiff in *Leonard* was estopped under South Carolina law from contending in a malicious prosecution action that the criminal action was instituted without probable cause, the Petitioner here is collaterally estopped from relitigating the issue of the existence of probable cause in his § 1983 action by the state court ruling finding probable cause.

B. It is unnecessary for this court to consider whether collateral estoppel was correctly applied to preclude re-litigation of the issue of probable cause because the courts below held that the Respondents were entitled to qualified immunity as they had an objectively reasonable belief that probable cause existed to believe that the Petitioner had committed or was committing a criminal offense.

Even if this Court were to determine that collateral estoppel was incorrectly applied to preclude the relitigation of the existence of probable in the Petitioner's § 1983 action, such a determination would have no practical effect on the outcome of this case. In addition to holding that the relitigation of the existence of probable cause was barred by collateral estoppel, the District Court held that the Respondents were entitled to qualified immunity as to the

Petitioner's three causes of action in which the existence of probable cause was a controlling issue. (App. 1o). The court there clearly and correctly held that the Respondents "had an objectively reasonable belief that probable cause existed that the [Petitioner] had committed or was committing a criminal offense." The Petitioner has not sought certiorari on the issue of qualified immunity.

CONCLUSION

For the foregoing reasons the Respondents herein respectfully pray that this Court deny the Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

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